No. 15412-15413

United States
Court of Appeals
For the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON, ENGLAND,
Appellant,

vs.

JANE S. LYONS,
Appellee.

GLENS FALLS INDEMNITY CO., a corporation,
Appellant,

vs.

JANE S. LYONS,
Appellee.

Brief of Appellee

Appeal from the United States District Court for the District of Oregon

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STATEMENT OF THE CASE

Plaintiff brought these actions to recover on three policies of insurance, payable in the event the insured, her husband, died as a result of accidental injury. The two actions were consolidated for trial, and on appeal.

The insured's death took place while on a vacation trip, fishing and hunting, in Mexico. His companions on the trip were his business partner, and

two thoroughly qualified cardiologists. At the time of his death he was hunting doves with a 12-gauge magnum shotgun.

At a time when the insured was separated from his hunting companions, two shots were heard in rapid succession, followed by a noise of stertorous breathing. Dr. Rush went to see what the trouble was, and found him lying unconscious, with blood and powder burns on his face. The insured was pulseless, and had a tremulous heartbeat. Within a few minutes, he died.

Both Dr. Rush and Dr. Chamberlain, the other physician who was in the party, testified, on the basis of their observation of the insured during the trip, his medical history, and the other relevant evidence, that the cause of his death was the gunshot wound. The pain and emotional reaction of the wound produced anguish and shock, causing the insured's heart to beat ineffectively so as to be incapable of sustaining life.

The sole issue at the trial was the cause of the insured's death, and the record consists almost exclusively of several hundred pages of expert medical testimony. The Honorable Edward P. Murphy, sitting without a jury, found that the insured was a vigorous, robust man of normal health for his age, that his death was not caused or contributed to by disease, but was occasioned solely by accidental,

violent and external means, to wit, the accidental discharge of the shotgun. He awarded to plaintiff a judgment on both policies, with costs and attorneys fees as provided by Oregon law. His memorandum opinion is found at p. 17 of the Glens Falls Record and p. 19 of the Lloyd's Record. It is published at 145 F. Supp. 877.

The sole issue presented upon this appeal is the sufficiency of the evidence to support the factual findings and legal conclusions of the trial judge.

STATEMENT OF FACTS

The only issue presented by this appeal is factual. Since the appellant's brief presents a rather incomplete, fragmentary and selective portion of the great mass of expert medical testimony which was introduced at the trial, it is necessary for appellee to state the facts of the case in considerable detail.

The Medical History of the Insured

At the time of Mr. Lyons' death, he was 49 years of age (R. 87). He was a successful executive in the lumber industry. The evidence revealed that he was an extremely dynamic, forceful and vigorous individual. He was an outdoor man, and used to considerable exertion (R. 53-56, 83-84, 89-91, 152, 204-205).

His family physician was Dr. McKeown, of Coos Bay, Oregon, a general practitioner (R. 195). Dur-

ing the course of his relationship with the insured, he conducted several heart examinations, which revealed that insured's heart was normal (R. 170). On one occasion, in 1950, because the insured had chest pains radiating down his arms, Dr. McKeown subjected the insured to all the tests for heart disease, and found his heart to be normal (R. 196-197). The doctor diagnosed the pains as intercostal neuralgia and anxiety tension (R. 198).

On February 3, 1953, one week before his death, Mr. Lyons returned to Palm Springs, California, from an extensive business trip (R. 56-58). On the night he arrived home, he had pain in his chest (R. 135), although as far as his wife knew, he slept through the night (R. 134).

The following day, Mr. Lyons consulted Dr. McBride, of Palm Springs, a specialist in internal medicine (Ex. 2, p. 8), whose deposition was introduced in evidence as Exhibit 2 (R. 85). Dr. McBride gave him a thorough cardiac examination, including exercise tolerance trials, and found them all to be within normal limits (Ex. 2, p. 4). The doctor diagnosed the pains as cardiac fatigue, due to excessive emotional stress on the business trip (Ex. 2, p. 4). He advised the insured that it would be all right to go on his contemplated fishing trip, but not to do any excessive work (Ex. 2, p. 4), because

the doctor was interested in the insured's getting some rest (Ex. 2, p. 8). The doctor's office notes indicate that he prescribed nitroglycerin if Mr. Lyons had pain (Ex. 18, R. 135). There is no evidence that Mr. Lyons ever took nitroglycerin.

The Condition of the Insured on the Fishing Trip

Insured was the guest of Mr. Irwin, a business associate, on the boat upon which the party went fishing (R. 170). The other two guests, Dr. Rush and Dr. Chamberlain, had both acted as Mr. Irwin's physician (R. 147, 170). Neither had ever met the insured prior to this trip (R. 147, 170). Both Dr. Rush and Dr. Chamberlain were cardiologists, and were eminently qualified in that field (R. 142-144, 168-170).

The parties met at San Diego, and flew down to La Paz, Mexico, by private plane, at an elevation of 7,000 feet. Mr. Lyons showed no signs of illness, shortness of breath or distress at that elevation (R. 147-148, 171).

The parties boarded the fishing boat that night, and fished unsuccessfully the next day (R. 149). The following day, a large marlin was hooked, and Mr. Lyons played it for half an hour until the line parted. This involved considerable exertion and hard work (R. 149-151, 176-177). He exhibited no signs of distress as a result of this exertion. The rest of the day was spent fishing, and shooting ducks, at

which the insured was steady and successful (R. 179).

During the course of the trip, the insured showed no signs of ill health, did his share of the lifting and loading involved, and ate normally (R. 173-174).

The Death of the Insured

The following morning, the party, except for Mr. Irwin, arose early and went on a dove hunting expedition near the village of San Lucas (R. 178). While they were waiting for the doves, they hiked around the country, including a climb up a sand dune 80 to 100 feet high (R. 157, 181). Mr. Lyons showed no signs of distress or discomfort (R. 157). In fact, he commented that it was nice to be alive on such a beautiful morning (R. 179).

The gun which Mr. Lyons was carrying was a Winchester 12 gauge magnum shotgun (Ex. 1), using magnum shells. These are considerably larger than ordinary shotgun shells and explode with considerably more force (R. 69, 166, 180).

When the doves finally began to come over, Dr. Chamberlain had wandered away (R. 157-158), and Dr. Rush was some yards from Mr. Lyons and unable to see him because he had his back turned and because there was brush between them (R. 181-183).

Dr. Rush heard shots, and saw a dove fall each time, until one occasion when he heard the shotgun go off twice in rapid succession. On this occasion, no dove fell after the second shot (R. 183). Some ten to twenty seconds later (R. 210), Dr. Rush heard a stertorous type of breathing, which he thought might be the snorting of some kind of wild animal, coming from the direction of Mr. Lyons. He walked over to investigate (R. 183-184). Mr. Lyons was lying on the ground on his face, under a mesquite bush, within thirty yards of where the doctor had left him (R. 184, 181). He was lying on his shotgun (R. 185). Blood was coming from the right side of his face (R. 186).

Other members of the party arrived and helped to roll Mr. Lyons over and attempt artificial respiration (R. 186). After a minute or two, frothy sputum, which gradually became blood tinged, began to come out of his mouth and nose. He was pulseless, and had no rhythmic heart beat, although there was a tremulous sensation in his chest like the purring of a cat (R. 187-188). He was cyanotic and unconscious (R. 188). He was cold and clammy (R. 375), an indication of medical shock (R. 327). There were powder burns and scratches on his face and neck, and Dr. Rush felt a pellet under the skin (R. 188-189). After five to seven minutes, Mr. Lyons expired. Artificial respiration was unsuccessfully attempted (R. 188).

An autopsy was performed upon the body of the insured by two young Mexican physicians (R. 264, Ex. 12, Ex. 15), at which Drs. Chamberlain and Rush, despite their express desire to be present, were not permitted to attend (R. 161, 192-193). The autopsy report is in evidence (Ex. 12). Exhibit 15 is a translation (R. 109) made by Dr. Christen, a Mexican pathologist associated with Dr. Lehman in Portland (R. 99).

The following findings of the autopsy were considered significant by the experts who testified at the trial. The lungs were found to be congested. The liver was very enlarged in weight and volume. The left ventricle was slightly hypertrophied. The aortic semilunar valves were thickened and hardened with atheromatous deposits, and the mitral valve was slightly dilated. The coronary arteries were diminished in caliber due to the presence of atheromatous placques.

The autopsy surgeons concluded that the cause of death was "aortic insufficiency that probably brought about the acute cardiac failure. Secondary lesions related to the cause of death. Coronary atheromatous placques (coronary insufficiency), pulmonary congestion and hepatomegalia."

Subsequently, one of counsel for defendants examined the autopsy surgeons ex parte, a translation of said examination appearing at pages 2 and 3 of

Exhibit 14. The autopsy surgeons stated that they found no evidence of an antemortem clot or a pulmonary embolus. They were unable to answer a question asked them regarding the extent of the diminishment of the coronary arteries.

SUMMARY OF ARGUMENT

Plaintiff had the burden of proving that the insured's death was caused by accidental bodily injuries, and that it was not contributed to by disease. The burden was met by the evidence of two distinguished cardiologists who testified that the cause of the insured's death was a gunshot wound. Their testimony was based, not upon speculation and conjecture, but upon their own personal observation of the insured over a period of two days, and under severe exertion, the autopsy findings, the personal and medical history of the insured, and the personal observation of one of them of the manner in which insured died.

Although there was no direct testimony that the gunshot wound preceded the fatal incident, this does not mean that the determination of the fact by the court was based upon speculation and conjecture. The evidence showed that the insured had a normal heart, and under all the circumstances of the case, the most probable and only logical cause of his death was a combination of cardiac arhythmia and shock, caused by the explosion of the shotgun in his face,

developing into ventricular fibrillation and producing death.

The argument that the insured's death was contributed to by disease is not tenable because, under the Oregon authorities, an insurance company must take the risk of a condition which is normal for the age of the insured, and the evidence in this case is that the insured's heart was normal for his age. Hence, even though the court found insured's heart to be "less than perfect," the deviations from perfection on an absolute standard would not be considered a "disease" within the meaning of the policy under Oregon law.

ARGUMENT

In order to recover in these cases, the plaintiff had the burden of proving that her husband's death resulted from accidental bodily injuries which, solely and independently of all other causes, occasioned his death, and that his death was not directly or indirectly caused or contributed to by disease or natural causes. Plaintiff met this burden by presenting the testimony of two eminent and qualified cardiologists that in their opinion the cause of the death of the insured was a gunshot wound, which produced pain, anguish and shock, causing the insured's heart to develop an unusual, abnormal rhythm, which in turn caused a functional coronary insufficiency and his death.

This testimony was not based merely upon hypothetical facts and the general experience of the doctors in the field of cardiology. It was founded upon their personal observation of the insured at close quarters over a period of two days; at a high altitude, under extremely heavy exertion, at meals and at rest. It was based upon the findings of one of the doctors who was with the insured at the very moment of his death. It was based upon a thorough and comprehensive cardiac examination of the insured made less than a week before his death, with normal findings, the electrocardiagraph chart of which the doctors personally examined. It was also based on the insured's personal and medical history.

Certainly the foregoing background of information furnishes as adequate a foundation and basis for the medical opinions as to the cause of Mr. Lyons' death as one could possibly get in a case of this kind. The opinions of the doctors were not based, as appellants assert, upon speculation and conjecture, but upon personal observation and long experience in the field of cardiology.

Appellants would have this Court speculate and conjecture about the adequacy of the foundation for the medical opinions of these qualified expert witnesses, and substitute its own opinion for theirs, based upon the fact that the doctors in their testimony occasionally used such language as "I think," "it is my belief," or "I must assume."

This captious and picayune quibbling over details of terminology could conceivably be justified with respect to certain types of evidence, but in this case it entirely ignores a record in which every phase of the opinion of these two doctors was thoroughly searched into and examined for hundreds of pages of testimony.

The doctors made extremely clear to the trial judge what their opinions were, and what the bases of those opinions were. It is true that they could not state those opinions with absolute certainty, but this is not required by law or logic. To characterize the medical opinions in this of all cases as being based upon mere speculation and conjecture is so far-fetched as to be frivolous.

The Testimony Regarding the Cause of Death

Both Doctors Rush and Chamberlain testified unequivocally that the cause of the death of the insured was the gunshot wound (R. 227-228, 364, 375-377). It is true that no one was with Mr. Lyons at the moment of the commencement of the fatal incident, and hence there is no direct evidence that the shotgun blast preceded the fatal ventricular arhythmia. To conclude from this fact that the doctors necessarily "assumed" that the shotgun blast preceded the heart failure and caused it, however, is to ignore the major portion of their testimony. The doctors were fully examined regarding all other possibili-

ties which might have caused the death of the insured. Their conclusion was arrived at by a process of elimination. They were familiar, from personal observation, with the manner in which Mr. Lyons did die, and on the basis of their experience knew what factors could cause death in that manner. They were unable to account for what they knew to have occurred on any basis but the necessary conclusion that the shotgun blast preceded and initiated the chain of events which followed.

As Dr. Rush stated, in explaining his answer as to the cause of death (R. 376-377):

> "And I think that we had involved in it—this was a rather unusual type of sudden death—inasmuch as it involved all four factors that we commonly find responsible for sudden death. They all seemed to be a part in this picture to me. That is the reflex phenomena that could produce shock and heart arhythmia, passive congestion which the autopsy findings stated were present, the arhythmia which I felt myself had to be present with the findings that I found when I was there. Yet, I know it could not have been only arhythmia because he lived too long, and he couldn't have developed the pulmonary edema and passive congestion had he died from just the arhythmia. There would not have been the time element. I further believe that this is a rather unusual type of case and I can only draw the conclusions that the primary thing must have been the ventricular arhythmia, because in

> sudden death that is caused by any strong emotional factor regardless of what it is. It's felt that ventricular arhythmia and primarily fibrillation was also the cause of death, but we know that particularly now, myocardial infarction is responsible for it, but this man had an autopsy which showed that he did not have a myocardial infarction. So I then must assume that it was some strong emotional factor that initiated it, because the other factors were not there."

Similarly, Dr. Chamberlain, when asked to assume that the injuries occurred after the onset of the heart failure, stated that he did not think the autopsy findings justified any such assumption (R. 311-312).

Certainly, the able trial court was fully aware of the fact that there was no direct evidence regarding the time element, and was not confused into believing that the doctors had "assumed" the very fact in issue (R. 268). The court permitted plaintiff to prove that the medical cause of death was the shotgun blast (R. 227-228, 364, 375-377), but refused to permit the plaintiff to prove further that on the basis of the medical evidence the shotgun blast must necessarily have preceded the chain of events which led to the insured's death (R. 256, 377-379).

It is obvious from the record that the court felt that it was for him to draw the conclusion regarding the time sequence based upon all of the evidence in

the case, and his complete understanding of the issue now raised by appellants is illustrated by the colloquy which took place when plaintiff offered to prove affirmatively by the testimony of Dr. Rush that the shotgun blast must have preceded the fatal heart incident (R. 403-404):

"Mr. Beebe: May the Court please, the plaintiff respectfully offers to prove as follows: The witness would be asked to assume the same facts which he has been assuming in his testimony in this case, and he would be asked to state whether he has any opinion as to whether there were any outside or any external forces other than the last shotgun blast which he heard, which could probably have initiated the fatal heart incident of February 10, 1953. If permitted to answer the witness would say that he has an opinion, and if asked what that opinion was, he would testify that in his opinion there was no other incident, other than the last shotgun blast that he heard which likely or probably initiated the fatal heart incident of February 10, 1953.

The Court: Well, counsel, it occurs to me that that matter has been adequately covered by the Doctor.

Mr. Beebe: I think it has been covered by a process of elimination, it has, and now in our effort to make a full presentation, we simply want to present it in the positive form, and we are making our offer of proof for the record.

The Court: I think I am afraid of that question, counsel, I think I would be afraid for the

record, too. I think that it has been adequately covered by a process, as you have suggested, of elimination, possibly by sort of a negative approach, but I think I have a complete understanding of the Doctor's reasons for that, and the offer of proof will be denied.

Mr. Beebe: As a matter of fact, your Honor, under the circumstances, the plaintiff will withdraw her offer of proof."

Medical Terms

In order to comprehend the reasoning process by which the doctors arrived at the conclusion that the shotgun wound must have been the cause of death, an understanding of some of the medical terms involved in the case is necessary. Without attempting to go too deeply into medical science, plaintiff wishes to set forth a brief discussion of some of the subjects which were considered in the medical testimony.

Atherosclerosis is a form of arteriosclerosis or a hardening of the arteries. To the extent of its presence, it reduces the caliber of the artery. It is the exception to find a man of the insured's age who would not have some atheromatous placques in the aorta or coronary arteries (R. 119-120, 269, 405).

Aortic insufficiency refers to an incompetence of the semilunar valves of the aorta (R. 346-347). It is generally caused by syphlitic or rheumatic heart disease (R. 224). It can be caused by arteriosclerosis,

but only in the presence of sustained hypertension of a moderate or severe degree (R. 239). In any event, that is a type of aortic insufficiency which would not produce a severe burden on the heart (R. 240). It was established beyond cavil that the insured did not have aortic insufficiency (R. 19, 223-224, 238-239, 240-241, 247-249, 252-253, 262-264, 314-315, 320, 346).

Coronary insufficiency is an impairment of the blood supply of the heart to the extent that it is unable to work properly (R. 267). An organic coronary insufficiency is caused by occlusion or blocking of the coronary arteries. At least two and generally three major branches of the coronary blood supply must be closed before a witness has coronary insufficiency (R. 236, 267, 272). If the insured had had a chronic coronary insufficiency, the autopsy would have shown degenerative change or fibrosis, showing that the heart had been poorly nourished from coronary insufficiency (R. 410). It would also have had to show, as above indicated, some blockage of the coronary arteries by a clot, embolus, infarction, or occlusion.

In the absence of autopsy findings which would establish the existence of organic coronary insufficiency, a competent cardiologist can determine the existence of the disease by observing the individual under exercise and this can be a more important

method of diagnosis than the physical findings (R. 268, 500).

The other type of organic insufficiency is functional, which can occur in the complete absence of any coronary disease (R. 317, 323). Anything that would prevent enough blood from going through the coronary artery to take care of the nourishment of the heart muscle would cause coronary insufficiency (R. 401), and this could be caused not only by blockage of the arteries themselves but by some interference in the blood supply, such as hemorrhage, shock or an ineffective heart beat (arhythmia) (R. 234, 243, 290-291).

Angina pectoris is not a disease, but is a symptom associated with coronary insufficiency (R. 286). Angina is the pain of coronary heart disease, and generally comes on during the peak of exertion, excitement or emotion (R. 219).

Ventricular tachycardia is a form of heart arhythmia involving a pulse of around 220 (R. 340). It is not incompatible with life unless it changes over to one of the other irregular rhythms, which it is very apt to do (R. 339). A heart rate from 260 to 300 is called ventricular flutter or rapid tachycardia (R. 291, 337). This condition will cause the pain symptoms of coronary insufficiency, due to a deficient blood supply on a functional basis (R. 277, 307, 317, 340-341). If the rate goes faster than

300, it is called ventricular fibrillation (R. 337). Neither ventricular flutter nor ventricular fibrillation are compatible with life if they continue long enough, because the heart beat is not capable of circulating the blood (R. 341).

The various arhythmias can be caused by anything which stimulates the nervous system (R. 287) such as fright, shock, or pain (R. 287, 303-304). The symptoms are that the patient first gets a sensation of weakness, and in a matter of three to five seconds develops a cold, clammy pallor or cyanosis. If it continues, the patient becomes unconscious. By this time, stertorous breathing will develop, and the patient dies of cerebral anoxia (R. 341-342). A purring sensation felt in the chest of an unconscious patient is an objective finding of ventricular flutter or fibrillation (R. 229-230, 292, 407).

Medical shock is a mechanism which is not well understood (R. 242), but its effect on the heart is caused by the fact that the blood tends to pool in reservoirs in the venous system and the blood pressure drops strikingly (R. 242-243). This causes undernourishment of the heart muscle (R. 250). Shock is a predisposing factor to ventricular fibrillation (R. 289). Among the common causes of shock are injury and strong emotion such as fright (R. 328-329). Thus, shock results in the heart getting too little blood supply by reason of the pooling of the blood and the consequent lowering of the blood

pressure, at the precise time it needs more by reason of adrenalin pouring out of the adrenal glands, causing a wasting of the oxygen which is already in the heart (R. 254).

With this background it is perhaps somewhat easier to understand and explain the mechanism by which the doctors believed the shotgun wound caused the death of Mr. Lyons, and their reasons for believing that to be the most probable cause of the ventricular fibrillation which developed.

The Mechanism by Which the Shotgun Wound Caused Death

For a variety of reasons, based upon their own observation of the insured, his medical history, and the autopsy findings, the doctors concluded that the insured was not suffering either from aortic insufficiency or organic coronary insufficiency prior to his death. As Dr. Rush stated, he had to assume that something started the chain of events leading to Mr. Lyons' death (R. 372). Shock was a part of the situation, because the insured was pulseless, cold and clammy (R. 375). He had a disturbed heart rhythm, which Dr. Rush could feel in his chest (R. 375-376). That, however, was not the sole cause of the death because he would not have lived long enough to have developed the pulmonary edema and passive congestion had he died from just the arhythmia (R. 377). The shock and arhythmia were

probably caused by the same external cause (R. 427). As previously described, arhythmia failed to produce circulation and caused passive congestion and damage to the blood vessels, the shock caused the blood to pool in reservoirs in the venous system, and at the same time it caused a wasting of the oxygen in the heart muscle which aggravated the arhythmia so the process became irreversible and resulted in ventricular flutter, fibrillation and death (R. 228-232, 242-243, 254-255, 291-295, 375-377, 394-395, 406-408, 409-410).

The Appellants' "Equally Probable Causes"

The process of elimination by which the doctors arrived at their conclusions can perhaps be best explained by a discussion of the various so-called "equally probable causes" offered by the defendants as an explanation for the death of the insured. Thus, the first possibility, that the insured might have suffered a sudden, fatal heart attack notwithstanding his negative case history and normal cardiac tests was rejected by the doctors for a number of reasons. (It should be noted, in this connection, that the defendants in their Brief fail to specify the type of "fatal heart attack" to which they now refer. Presumably they mean a sudden heart failure or heart standstill.) Dr. Chamberlain stated (R. 230):

> "Now, a man whose heart suddenly stops does not develop manifestations of congestive heart failure in a half minute."

Similarly, he further stated (R. 257):

> "The answer is that I believe as I stated before that sudden death, that sudden standstill of a heart, for example, doesn't result in evidence of congestion in the liver. Sudden standstill does not result in evidence of congestion of the liver or evidence of congestion in the lungs such as was described here. That sort of thing takes minutes of life and blood flow for a period of at least a few minutes."

Dr. Chamberlain further testified that hardly any patients who have a cardiac standstill develop an abnormal heart rhythm (R. 292). The abnormal rhythm and the congestion of the lungs (pulmonary edema) were both observed directly and personally by Dr. Rush (R. 187). The autopsy findings confirmed the existence of lung congestion and added the further fact of congestion of the liver. It was therefore apparent to the doctors, on the basis of what Dr. Rush had observed and felt at the time of death, that this was not a case of a sudden cardiac standstill.

If by "fatal heart attack" defendants refer to some other type of seizure, it could not have been a coronary thrombosis, because there was no clot or embolus found by the autopsy surgeons (Ex. 14), nor did they find a miocardial infarction. There was no finding of fibrosis (R. 410). It was clearly not a case of aortic insufficiency (R. 223-224, 238-239,

240-241, 247-249, 262, 314-315, 320), which was the erroneous conclusion drawn by the autopsy surgeons from the physical findings they made, nor was there any organic coronary insufficiency (R. 235, 236-237, 267, 271-272, 285-286).

The second suggestion made by defendants is that the "derangement within the heart" found by the autopsy surgeons might have precipitated the fatal heart attack. The only findings made by the autopsy surgeons which might justify this description were the presence of atheromatous placques and the diminishment of caliber of the coronary arteries. The doctors testified that the insured's heart was normal for his age (R. 251-253, 269-270, 357-358), that the presence of atheromatic placques was not a serious finding in the absence of any heart murmur (R. 213), and that they played no part in connection with the death of the insured (R. 256). The diminishment of the coronary arteries is also not a serious finding in the absence of an occlusion of several of the major branches of the coronary arterial system (R. 236, 267, 271-272), and there was no such finding. Moreover, the pain of coronary heart disease comes on at the peak of exertion (R. 219). Aside from the autopsy findings, Dr. Rush testified that the personal observation he made of the insured under the most severe kind of exertion would be an extremely important factor in reaching his conclusions (R. 500), perhaps more important

than the autopsy findings in any event. The so-called "derangement" within the heart of the insured revealed by the autopsy was such as would most probably have been found in any man of his age (R. 269), and it would have been exceptional if such findings had not been made (R. 119-120).

The third "equally probable cause" is that the insured's chest pains of February 3 were attacks of angina pectoris. The insured had a thorough cardiac examination by a specialist in internal medicine for the sole and precise purpose of determining the cause of the insured's pains at that time. All of the tests were normal, and the pains were diagnosed as heart fatigue. Surely the considered conclusion of a competent specialist engaged in trying to determine the precise question of the cause of the chest pains of that date is a reasonable basis for the conclusion that they were what he said they were and not something else. The reasons Mr. Lyons did not have angina are also discussed in the following paragraph.

The fourth possibility mentioned is that an attack of angina pectoris could have precipitated the fatal heart attack. Dr. Chamberlain definitely testified that "the evidence is strongly against the fact that he could have had" (R. 285). The record establishes that angina pectoris is not a disease itself, but is the symptom of coronary heart disease (R. 219, 285),

also known as coronary insufficiency (R. 286). There can be no coronary insufficiency without the occlusion of several branches of the coronary artery (R. 236, 267, 271-272). Moreover, angina comes on at the peak of exertion (R. 219), not thirty or forty minutes later (R. 285-286, 485), and there is no reason to suppose that the insured, who had battled a large marlin for thirty minutes the day before, and had climbed an 80 to 100 foot sand dune more than half an hour before without visible signs of discomfort (R. 157, 179, 485), should suddenly develop angina pectoris pains while moving approximately thirty yards (R. 181), in the course of shooting several doves. If two experienced cardiologists can state, on the basis of their personal observation of Mr. Lyons under severe exertion, that he did not have coronary insufficiency, there is certainly no reason why this Court should hold that the trial court had no right to accept that conclusion.

Defendants' fifth speculation about "equally probable causes" is that the insured might have been engaged in exertion which precipitated the heart attack during the few minutes that he was separated from Dr. Rush. In the first place, he was found only thirty yards from the place where Dr. Rush left him, and had been shooting doves with some regularity in the interim (R. 181-184). It is a reasonable assumption that a hunter waiting for birds to come over would not have been engaged in any more

activity than was necessary. Moreover, as just stated, Drs. Chamberlain and Rush had observed the insured under the most strenuous type of exertion in playing a marlin on the previous day, and under quite substantial exertion in climbing a sand dune shortly before, with no ill effects. They concluded from their own observations that it was not exertion which precipitated the fatal ventricular fibrillation (R. 285-286, 391-392).

The sixth conjecture made by the defendants is that a viscus reflex from a gall bladder attack might have precipitated the fatal incident. Dr. Rush (R. 446-448, 449), and two of defendants' witnesses (R. 566, 634), all testified that the gallstone found upon autopsy could not have passed through the cystic duct without evidence of tearing and trauma observable on autopsy. No such finding was made. Dr. Rush was of the opinion that the gallstone had passed through the duct long before, when it was smaller, because a stone of that size could probably not have passed through the duct at all (R. 446-447). Both Drs. Rush and Chamberlain were of the opinion that the gallstones had nothing to do with the insured's death (R. 258-259, 395).

The seventh "equally probable cause" appears to answer itself. Drs. Rush and Chamberlain were of the opinion that a coronary occlusion or miocardial infarction did not occur in this case because

there was no evidence that it did occur. It is a little difficult to see what more can be said in this regard. The same reasoning would apply to almost any physical condition which the ingenuity of defendants' counsel might dream up at this stage of the proceedings. The doctors testified as to what, in their opinion, caused the death of the insured. It would be absurd to require them also to testify as to their personal knowledge of the absence of each and every other conceivable possibility, when there was no evidence to support the existence of such possibilities. Moreover, the autopsy report did not show either of these conditions.

The eighth "cause" is that possibly something else precipitated the cardiac arhythmia. The doctors testified as to the accepted causes of such condition, and gave their reasons for eliminating causes other than some external factor producing a pain, shock, anguish reflex (R. 227-331, 376-377).

Incidentally, defendants once again use the phrase "superficial pain" for which counsel was corrected during the course of the trial (R. 439). The evidence is that the *injuries* were superficial and that superficial injuries are very painful (R. 303-304). There is nothing in the record to justify the statement that the *pain* was superficial.

Each of the suggested "causes," therefore, are shown to have been considered, discussed and re-

jected. The Court was required to arrive at an opinion regarding the most probable cause of Mr. Lyons' death, and the foregoing discussion illustrates the ample reasons he had for refusing to accept the "causes" now proffered by appellants.

Appellants' Other Arguments

It is not our intention to follow appellants down every legal and factual blind alley in their argument. Nevertheless, some of the more egregious misstatements should be noted. Thus, at p. 35 it is stated that Dr. Rush and Dr. Chamberlain concluded that the autopsy surgeons were incompetent to determine the cause of death. Apparently appellants' attorneys have likewise reached that conclusion, as aortic insufficiency, which the autopsy surgeons concluded to be the probable cause of death, is significantly missing from their list of "equally probable causes." There are a number of reasons why Mr. Lyons could not have had aortic insufficiency (R. 121-122, 123, 223-224, 239, 247-248, 262), but suffice it to say that Drs. Rush and Chamberlain both testified that they could have diagnosed aortic insufficiency at sight because of a leaping pulsation of the neck vessels which would be more noticeable if a man were under exertion as Mr. Lyons was while playing the marlin (R. 238-239, 319-320, 444).

Defendants then go on to state that plaintiff must accept the "corollary premise" that there is no com-

petent evidence that any of the conditions not found by the autopsy did not exist. This does not follow at all. Because the autopsy surgeons drew an erroneous conclusion from the conditions they found to exist as to the cause of death does not indicate in any way that other conditions which they did not find to exist were present. The court could very well find, and undoubtedly did, that while the Mexican surgeons were competent to perform an autopsy and describe what they saw, they were not sufficiently qualified cardiologists or pathologists to draw the correct conclusions from what they found. Drs. Rush and Chamberlain, on the other hand, were eminently qualified cardiologists, fully capable of drawing the correct conclusions from all the evidence including that which the autopsy did reveal and failed to reveal (R. 265, 268, 500).

With respect to the question of chest pains, at pages 35 and 36 of their Brief the defendants rely upon the notes of Dr. McBride and the fact that he cautioned Mr. Lyons against "tramping around fields," but ignore the testimony of Dr. McBride that he found Mr. Lyons' heart to be normal and diagnosed his pains as resulting from heart fatigue due to emotional stress (Ex. 2, p. 4). They further ignore the fact that Dr. McBride's caution against "tramping around fields" was based upon the fact that he wanted Mr. Lyons to get as much rest as pos-

sible (Ex. 2, p. 8), and not upon fear of the consequences.

Moreover, Dr. Chamberlain testified that most patients who come to a heart specialist have no heart disease, and that the pains in their chest are generally fatigue (R. 145-146, 237). In fact, despite the statement by the defendants that "constricting chest and arm radiation pains are to considered 'angina pectoris'," the evidence is that (R. 145):

> "Awareness of the beating of the heart, irregularity of the pulse, *and especially pain in the chest very often radiating down the arms, which come on as a pattern effect.* In other words, many of the people we see, when they get tired, they have a chest ache that is commonly thought of as part of fatigue, and the person will get an ache, and they think that it is heart trouble and so they get a chest ache." (Emphasis supplied).

Dr. Chamberlain testified that such pains are considered angina until proven otherwise, not because that is the commonest cause, but because it is so serious (R. 284).

Far from the fact being that "Dr. McBride's record affirmatively establishes as a fact the chest pains resulted from attacks of angina pectoris," as stated by defendant, the *testimony* of Dr. McBride affirmatively establishes precisely the contrary.

With respect to the subject of exertion, Drs. Rush and Chamberlain are stated to speculate as to the exertion expended by the insured prior to his fatal heart attack. Certainly the court might appropriately conclude that the exertion expended by the insured in moving thirty yards while shooting four doves was not comparable to the exertion of playing a 200-lb. marlin for half an hour or climbing a 100-ft. sand dune. The doctors reached the medical conclusion that the insured did not suffer a heart attack as a result of exertion, because they had had an excellent opportunity to observe his reactions under violent exertion.

Appellants state that Dr. Chamberlain's testimony to the effect "that an abnormal rhythm is more apt to develop in the heart as a result of some underlying disease (R. 229) and an emotional factor would not precipitate coronary insufficiency unless there was something else physically which intervened (R. 274-275), infers (sic) a diseased condition existed in the insured's heart." It is not surprising that appellants desire to draw this inference. The trial court, however, did not do so, and his conclusion is amply supported by the competent testimony of qualified witnesses to the effect that Mr. Lyons' heart was normal (R. 252-253, 269, 278, 343, 357-358). These medical witnesses based their conclusions not only on the autopsy report, but on their personal observation of the insured under heavy

exertion. Moreover, the doctor who less than a week before insured's death had performed a thorough cardiac examination also concluded that Mr. Lyons' heart was normal (Ex. 2, p. 4). Appellants have throughout these proceedings demonstrated a willingness to infer from the fact that the insured's death involved heart failure, that there was something else wrong with his heart before that moment. On the basis, however, of substantial evidence, the trial court rejected this conclusion, determined that the heart of the insured was normal, and that the gunshot wound caused a reaction which culminated in an ineffective beating of the heart and death.

Defendants' Authorities

The authorities cited by defendant all arise out of varying factual situations with respect to the sufficiency of the evidence to support the facts required to be proved. None of them even remotely resemble the instant situation with respect to either the quantity or quality of medical evidence, and there does not seem to be any point in discussing all of them. The case of *McKay v. State Industrial Accident Commission,* 161 Or 191, 87 P2d 202 (1939), however, is worthy of attention because it discusses the Oregon rule relating to the basing of an inference upon an inference. In their lengthy quotation from the *McKay* case the defendants significantly omit the following passage with respect to

the rule:

> "We will not extend this opinion unduly by analyzing these and like decisions, but we are confident that even the critics of the doctrine would not question the soundness of the results arrived at in these cases, although they might prefer a different *ratio decidendi*. The purpose of the rule is not to inhibit our inveterate reasoning processes; it is merely a means of testing logically the relevancy or sufficiency of evidence to prove a fact in dispute. It does not forbid judgments based on circumstantial evidence, for, as Mr. Justice McBride said in *State v. Clark,* 99 Or. 628, 666, 196 P 360:
>
> 'One fact may give rise to a single inference, or it may give rise to several inferences, or a logical conclusion may be drawn from a multitude of detached circumstances so related to each other and to the fact to be proved that it would be illogical to assume that they could all exist coincidentally and the fact in dispute be nonexistent'."

In the *McKay* case, there was evidence that McKay suffered an electric shock, and that while driving home some time later his car suddenly veered off the road, causing a head wound sufficient to cause death. There was no evidence whatsoever of an injury to the heart. It was impossible in that case to arrive at the conclusion that the deceased had had a heart fibrillation except from the fact that he had died, whereas in the instant case Dr. Rush personally

felt the fibrillation caused by the gunshot wound, and the autopsy findings of lung and liver congestion confirmed its existence.

The defendant suggests, citing *Lippold v. Kidd,* 126 Or 160, 269 P 210 (1928) that:

> "Difficulty in establishing a fact should not prompt the court to dispense with proof and impose a liability upon one who did not inflict the injury."

We certainly have no quarrel with this conclusion. On the other hand, the difficulty of proof certainly affects the amount of evidence necessary to constitute a preponderance, once the fact in question has been satisfactorily established. After all, as the Oregon Court pointed out in *Mt. Emily Timber Co. v. Oregon-Washington R. & N. Co.*, 82 Or 185, 201, 161 P 398 (1916), "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. * * *" The mechanism of death which the doctors described was admittedly an unusual one. On the basis of all of the facts before them, including their own personal observation of the insured, they concluded that it was nevertheless the most probable cause of his death. The trial court accepted this conclusion as it had every right to do.

Relevant Oregon Cases

In discussing the lengthy collection of Oregon authorities which they cite, defendants significantly omit to mention the two cases decided by the Supreme Court of Oregon within the last year dealing with policy provisions similar to those in question. Both of those cases are in point, and the rule laid down in those opinions goes considerably further than would be necessary to sustain the decision of the trial court here.

In both *Todd v. Occidental Life Ins. Co.*, 62 Or. Adv. Sh. 675, 295 P2d 870 (1956), withdrawn on rehearing 63 Or. Adv. Sh. 333, 303 P2d 492 (1956), and *LaBarge v. United Ins. Co.*, 63 Or. Adv. Sh. 345, 303 P2d 498 (1956), confirmed on rehearing 64 Or. Adv. Sh. 81, 306 P2d 380 (1957), the insured was suffering from a condition which, to use the language of the trial court's opinion here (Glens Falls R. 18; Lloyd's R. 20) was: "less than perfect when measured by a standard of perfection."

In both cases, the insured had osteoarthritis which was not a disabling condition prior to his accidental injury, and in both cases the combination of the injury and the arthritis caused the insured to be disabled. In the *Todd* case, there was the further factor that the evidence showed that the amount of arthritis which the insured had was normal for his age.

In the first *Todd* opinion, the court held that since the disability would not have existed without the concurrence of the arthritis, the arthritis was a concurring cause thereof, and hence the insured could not recover under his policy. On rehearing, however, this conclusion was withdrawn and the court stated that: "it seems only logical that it [i.e. the insurance company] accepts the risks of infirmity which are generally considered normal to mankind at the various stages of life, and, therefore, that osteoarthritis, which in common parlance may be considered normal from that which would be considered abnormal, cannot be considered a concurring cause of disability."

On the same day, the court handed down its decision affirming a judgment for the insured in the *LaBarge* case and saying:

> "Plaintiff LaBarge has been disabled by rheumatoid arthritis, which, but for the accidental injury, would not have impaired his ability to work in any manner. In the light of such facts, the determination of the jury that the arthritic condition was not an 'other cause' of the disability will not be disturbed." (Citing cases).

On rehearing of the *LaBarge* case, the Court once again re-examined the question of causation and the authorities at length. It stated:

> "Certainly, physical differences, as is recog-

nized in *Todd v. Occidental Life Ins. Co. of California*, ____ Or ____, 303 P2d 492, render some more susceptible to the sustaining of crippling disabilities after trauma than others, but unless the differences are great enough in and of themselves to threaten imminent disability of the kind actually resulting, they cannot later be said to have been the cause of the disability."

The Court further said:

"The evidence brings this case fully within the rule which treats abnormalities as dormant when they do not prevent the insured from going about his daily activities and earning his livelihood. When such is the case, the abnormality is not deemed the cause if an accident happens which lowers the resistance and thereby permits the dormant condition to disable the insured."

Applying the rules of these decisions to the instant case, we arrive at precisely the result which was reached by the able trial court, who stated in his opinion (Glens Falls R. 17, Lloyd's R. 19):

"The trial consumed a considerable number of days. Six eminent heart specialists, and several other highly qualified medical specialists testified at great length. The court having been placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death, it has reviewed the testimony and the record, and has been convinced

by a preponderance of the evidence that the assured at the time of his death was a vigorous, robust man of normal health for his age; that the condition of his heart and arteries, while less than perfect when measured by a standard of perfection, was 'normal' and 'healthy' and not diseased within the meaning of those words for purposes of the policies in question; that on February 10, 1953, an accidental discharge of assured's shotgun resulted in injury to the assured to the extent of powder burns and at least one gunshot pellet being propelled into his face; that as a consequence of these bodily injuries a shock reaction commenced in the assured which terminated with heart failure; that although a heart which was perfect when measured on an absolute standard would have withstood the pain and shock of the injuries received by the assured, many hearts which are considered in view of the age and general condition of their possessors normal and robust, and not diseased within the meaning of the policies in question, might have succumbed to injuries and shock such as those received by the assured; that the assured in fact succumbed by reason of the injuries and resultant shock he accidentally sustained; and that the plaintiff has sustained his burden of proof on all matters before the court."

In view of the *Todd* and *LaBarge* decisions, defendants' argument that the death of the insured was caused or contributed to by disease is clearly

without merit. There is ample evidence, under the *Todd* decision, that insured's heart, though not perfect, was normal for his age. The *LaBarge* case holds that abnormalities which do not interfere with the insured's living a normal life cannot be considered the cause of a subsequent disability. Certainly, any "abnormalities" in Mr. Lyons' heart, even if it be held not to have been normal despite the testimony that it was, did not interfere with his living a normal existence. Moreover the record establishes that the condition of his heart was such that he would not have died when he did except for the accidental shotgun wounds. See *LaBarge* decision at 64 Or. Adv. Sh. 91.

Other Authorities

The large number of Oregon cases cited by defendants all arise out of wholly dissimilar factual circumstances, and a discussion of them would be fruitless. The argument that because there is no direct evidence of the shotgun blast having preceded the insured's heart attack, the findings of the court must necessarily have been based upon speculation and conjecture is one that has been rejected in a number of cases. This Court, for instance, in order of *United Commercial Travelers v. Groves*, 130 F2d 863 (CCA 9, 1942), a case arising out of the State of Washington where the law with respect to the interpretation of the policy clause here involved is

similar to the Oregon interpretation laid down in the *LaBarge* case, the insured was climbing a ladder and fell off. The court stated:

> "There was medical testimony, undisputed, that deceased's heart was about 20% over normal in size, and that he had hardening of the arteries, although he had had a physical examination about a month prior to his death which disclosed, insofar as the doctor could tell, a normal heart condition. Other medical testimony was in conflict. The cause of the death was a blood clot, coronary occlusion, stopping the flow of blood to one side of the heart. Some medical testimony supported the theory that the shock of the fall caused the blood clot, and other medical testimony supported the theory that the blood clot caused the fall."

This court held that the jury could and did find that the shock of the fall caused the clot, and the fact that the arteriosclerosis made the deceased less immune to that catastrophe would not prevent recovery. The fact that there was no direct evidence that the heart attack had not preceded and caused the fall did not prevent the jury from drawing the conclusion that a person with a normal heart required some outside agency in order to bring about the death.

In *New York Life Insurance Co. v. Hoffman,* 218 F2d 465 (CA 6, 1954), the insured died in an automobile accident. The only eye-witness testified that

the insured did not have his hands on the steering wheel but was bent backwards on the driver's seat when the car left the highway. The Court, in a per curiam opinion, held that the testimony that the insured had never been sick, and had a normal heart, was sufficient to take to the jury the question of whether death was caused by external, violent and accidental means. Among other testimony mentioned by the Court was the evidence of a well-qualified doctor who swore that the occlusion which caused the insured's death had been brought about by the accident. Obviously, this doctor could not know whether the heart attack preceded the accident or followed it, but his opinion was not dismissed as speculation and conjecture.

In *Carolina Life Ins. Co. v. Williams*, 210 F2d 477 (CA 5, 1954), the evidence was that the insured went into a pasture to catch a horse, that while he was in the pasture an individual hunting rabbits nearby fired a shot, and that the insured's body was later found in the pasture. There was evidence that the insured had been on the horse. There was also evidence that the horse was gun shy. Insured died of a ruptured aorta, and it could have been caused by a fall from a horse. The Court of Appeals held that the verdict was based upon mere speculation because the jury could not know whether the ruptured aorta was caused by the insured's jumping on the horse, which would not have been accidental,

or by falling from the horse when it was frightened by the firing of the gun. The Supreme Court of the United States, *Williams v. Carolina Life Ins. Co.*, 348 US 802, 75 S. Ct. 30, 99 L. Ed. 633, granted certiorari and reversed, per curiam, without opinion. A petition for rehearing was denied 348 US 889. The facts in that case were not nearly as strong as the facts in the instant case, because under both the theory of the insured and that of the insurance company, death would have been caused in the same way. In the instant case, on the other hand, the actual manner of death was consistent only with the theory of the plaintiff. Nevertheless, in the *Williams* case, the Supreme Court refused to permit a reversal of the judgment upon the ground that it was based upon mere speculation and guess. The issue of whether the insured's death was caused by the insured being thrown from the horse was a proper one for determination by the trier of fact.

In *Prudential Ins. Co. of America v. Carlson,* 126 F2d 607 (CCA 10, 1942), cited with approval by the Oregon court in holding for the insured on rehearing in the *Todd case,* 63 Or. Adv. Sh. at p. 338, the insured was injured in an automobile accident, and died of a coronary occlusion. With reference to the question of causation, the court stated, at p. 611:

> "The medical experts for appellant and appellee are in accord that arteriosclerosis is a condition that comes on with advancing years;

that it is quite generally present in persons after reaching middle age; and that notwithstanding its presence, people thus afflicted ordinarily live many years. It is a natural consequence of old age. Medical experts testified on behalf of appellee that a microscopic examination of the heart showed no evidence of previous heart failure of a congestive type; that everything pointed to an 'acute affair'; that but for the trauma, deceased would have lived for years notwithstanding the presence of arteriosclerosis. *Dr. John H. Luke, called as a witness for appellees, on cross examination was asked whether the final cause of death was not the coronary thrombosis and coronary sclerosis and whether all that the trauma did was only to aggravate the then existing condition. He replied, 'No, sir. Just the opposite. The accident was the whole thing.' This testimony amply sustains the finding of the trial court and the judgment based thereon that the death of the insured was the result, directly and independently of all other causes, of bodily injuries received by him in the accident.*" (Emphasis supplied).

In the instant case, too, we have the positive testimony of two doctors that the cause of death was a gunshot wound (R. 227-228, 364). Furthermore, all of the evidence, as in the *Carlson* case pointed to an acute affair, resulting from external and violent causes, and not from any internal or spontaneous cause.

In *Lang v. Metropolitan Life Ins. Co.*, 115 F2d 621 (CCA 7, 1940), the insured, who had not been feeling well during the day, fell face forward on a rug and died within ten minutes. There was evidence that the heart was normal for the decedent's age, although there were a few spots of arteriosclerosis. The doctor gave it as his opinion that the insured had died from hemorrhage as the result of the fracture of his nose. There was, of course, no way for the doctor to know what had caused the insured to fall. The court stated:

> "Now, upon this record, the defendant contends that the evidence does not establish that Lang's fall and death was caused by accidental means and counsel insists that Lang did not slip, stumble or suffer an accident which caused him to fall; that he merely collapsed while walking across the hall, and the mere fact that he fell and death occurred does not establish that such fall resulted from accidental means. He also claims that Lang died from heart failure or heart disease and not from injuries."
>
> * * *
>
> "The next question to be considered is whether Lang's death occurred as a result of the injuries received in the accident, directly or independently of all other causes. The question as to what was the cause of death, was one of fact, Christ v. Pacific Mutual Life, 312 Ill. 525, 144 N. E. 161, 35 A.L.R. 730, Prehn v. Metropolitan Life Ins. Co., 267 Ill. App. 190, Rebenstorf v.

Metropolitan Life Ins. Co., 299 Ill. App. 71, 19 N. E. 2d 420.

"In considering this contention it is well to keep in mind that it is the duty of the jury to pass upon the credibility of the witnesses and the weight of the testimony and if the jury believed the testimony of the witnesses for the plaintiff to be true, then it was its province to find that Lang's death occurred as a result of an injury received in an accident directly and independently of all other causes.

"After due consideration of the record we have reached the conclusion that there was sufficient evidence to support the verdict. It must therefore prevail."

In *Maryland Casually Co. v. Stark*, 109 F2d 212, (CCA 9, 1940), this Court, in a case arising out of the Nevada District Court, reviewed a jury verdict in favor of plaintiff. The insured had died as a result of drowning in an irrigation ditch. He had suffered a brain hemorrhage. There were no witnesses to his falling into the ditch, and the insurance company contended that the hemorrhage had preceded the fall and caused it. The court stated, at p. 214:

"We have reviewed the evidence, giving 'due regard' to 'the opportunity of the trial court to judge of the credibility of the witnesses', and as a result, particularly in view of the agreed fact that the insured fell into the water and in view of the oral testimony indicating healthy physical

> condition, that the cause of death was asphyxiation by drowning, that the hemorrhage followed rather than preceded the fall and probably was caused by the asphyxiation, we hold there was no error in finding that the deceased 'accidentally fell into the * * * (ditch) and as a direct result thereof, independently and exclusively of all other causes, the said * * * (deceased) then and there died by drowning in said * * * (ditch). That said accident and death was not caused or contributed to directly or indirectly, wholly or partly, by bodily or mental infirmity, or by any kind of disease; * * *', and that there was no error in refusing to adopt the finding requested by appellant."

Once again, despite the fact that there was no direct evidence of the time sequence, the court held the medical testimony sufficient to establish the case.

Similarly, in *Preferred Accident Ins. Co. of New York v. Combs,* 76 F2d 775 (CCA 8, 1935), in which the deceased had arteriosclerosis, the court stated as follows with respect to the question of the time sequence:

> "The second matter urged by defendant is that it was not shown that the fall was accidental in the sense of the policy because, according to its theory, it was caused or might have been caused by a hemorrhage brought on from excitement occasioned by the controversy with Karschner. The evidence is clear that a hemorrhage in one having friable arteries, and

deceased had such, might be caused by external force or by excitement. It is the contention of appellant that the controversy with Karschner excited the deceased, causing a hemorrhage which resulted in the fall. The evidence of the plaintiff negatives the existence of excitement. The further evidence of the autopsy shows a hemorrhage at the place where the outside force appeared to have struck the head. The first would make a jury question. While still leaving the matter a question for the jury, the latter evidence almost precludes a finding such as that contended for by defendant. It is very strong physical evidence that the external force caused the hemorrhage rather than that the hemorrhage occurred first and happened to be at the precise point where the external force later was applied. There was, therefore, ample evidence to authorize the submission of that matter to the jury."

Even the case of *Devine v. Southern Pacific Co.*, 207 Or 261, 295 P2d 201 (1956), cited by appellants indicates that a positive statement by a competent medical witness as to the fact of causation is sufficient to take the case to the jury. We need not rest on the mere statement of causation, because the opinion of the doctor was amply explored and shown to be based on a firm foundation. Plaintiff carried her burden of proof in all respects, and the judgment of the court below rests not upon speculation and conjecture but upon a firm factual basis.

Another significant Oregon case is *Bertschinger v. New York Life Ins. Co.*, 166 Or 307, 111 P2d 1016 (1941). That was an appeal from a plaintiff's verdict in an action for double indemnity under a life insurance policy. The insured was found in the river after he had apparently gone on a fishing trip. The defendant contended that he had committed suicide by reason of despondency for having been convicted of practicing medicine without a license. The court held that plaintiff had sustained his burden of proving that death was met from an accidental cause, although there was no direct evidence of the manner in which the insured had died.

In *Buckles v. Continental Casualty Co.*, 197 Or 128, 251 P2d 476, 252 P2d 184 (1952), the insured, who suffered from arteriosclerosis, died in an automobile accident. The issue before the court was in effect whether there was any evidence that the automobile accident which caused the injuries was accidental, and not caused by a heart attack. The Court stated, 197 Or at p. 136:

> "Proof of the fact that an accident preceded and caused the death need not be established by direct evidence. It is sufficient if from all the facts and circumstances established by the evidence the jury might reasonably infer that an accident happened which proximately resulted in the death. In other words, the fact of accident may be established by circumstantial, as well

as by direct, evidence. *Metropolitan Life Ins. Co. v. Jenkins,* 152 Fla 486, 12 So2d 374."

The court further stated, at p. 138:

"Defendant's entire case is built upon the proposition that under the facts of this case a jury must speculate whether the car was caused to leave the highway because of some mishap, or whether it was brought about by decedent's suffering a heart attack. A complete answer to this contention is to be found in *Metropolitan Life Ins. Co. v. Jenkins,* supra.

"It is our opinion, however, that the evidence eliminates heart attack entirely as a factor in this case. *Wholly apart from the direct testimony of the medical expert that arteriosclerosis did not, nor did angina pectoris, play any part in the death, which in and of itself is sufficient to take the question of heart attack out of the case,* it is obvious that had decedent suffered such an attack severe enough to cause him to lose control over the car, the same attack would no doubt have prevented him from setting the brakes in an effort to stop. It must be kept in mind that only a second or two could possibly have elapsed while the car was crossing and leaving the highway." (Emphasis supplied).

We cannot do better than to end this argument with a quotation from the above-cited case of *Metropolitan Life Ins. Co. v. Jenkins,* so heavily relied upon in the very recent *Buckles* case. In *Jenkins,*

the insured died when his car drove over a cliff. The only eye witness report was that plaintiff's hand was seen twitching and jerking as the car sank in the water. Defendant claimed that an epileptic or some other type of convulsion to which insured had once been subject caused the car to go off the road. The Court stated the appropriate rule to be applied in this situation in the following language:

> "As we have said before, the burden rests upon the plaintiff of proving by a preponderance of the evidence that death was within the terms of the policy. An even balancing of the evidence on the issue presented by the declaration will fail to sustain such burden. But such allegations need not be supported by direct proof. Indeed, there are times when such proof cannot be forthcoming. Under such circumstances, it surely cannot be seriously contended that there can be no recovery simply because there is no proof of the precise condition that brought the accident about. If that were the rule, no death by accidental means could ever be inferentially established; and no accidental death could ever become a ground for recovery under a policy like this, unless it happened in the presence of eye witnesses in such manner as to impress upon them every detail of the accident. The true rule is that such allegations need not necessarily be supported by direct proof. Circumstantial evidence will support a verdict for plaintiff, if the circumstances surrounding and leading up to a violent and ex-

ternal death be such as to create in the minds of reasonable men acting as jurors a strong belief that death was caused solely by accidental means; and as to rationally outweigh the probability that it was contributed to by disease or bodily or mental infirmity. The test of the sufficiency of such proof is whether these circumstances, when viewed as a whole reasonably exceed by their preponderant probative weight any other equally plausible explanation well-founded in evidence."

CONCLUSION

It is the sincere hope of counsel for the plaintiff that the extended length of this brief will not obscure the basic fact that plaintiff succeeded in proving her case by the overwhelming preponderance of satisfactory evidence. In fact, plaintiff respectfully suggests to this Court that this appeal, which consists of nothing but a reargument of factual questions presented to and decided by Judge Murphy on very substantial evidence is frivolous. As this Court warned in *Mason v. Summer Lake Irr. Dist.*, 216 F2d 609 (1954), the damages provided by 28 USCA §1912 should be imposed in this case. Compare *Massachusetts Bonding & Ins. Co. v. Feutz,* 182 F2d 752, 758 (CA 8, 1950).

Appellants present a mass of speculation, conjecture, contrary inferences and assumptions which they prefer to draw from the testimony. The trier of fact, however, was, as he himself stated "placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death." His memorandum opinion shows his thorough understanding of the issues, and further indicates that he quite justifiably placed greater weight on the testimony of plaintiff's expert witnesses for the excellent reason that they had had the opportunity to personally observe the insured at moments of peak exertion.

The basic issue in this case, beneath all the medical testimony and terminology, is a relatively simple one. That issue is whether the insured's heart was diseased in some manner which caused his death or whether death was caused by some outside force which produced shock and consequent arhythmia. The unanimous conclusion of the doctors who had seen and examined insured during his life was that his heart was normal. There was nothing shown in the autopsy report which would change or affect this conclusion. On the basis of these relatively simple facts, the court was fully justified in concluding that the insured died as a result of an experience producing anguish and shock, and that that experience was the accidental explosion of a magnum shotgun in his face.

The two judgments of the court below are correct, and should be affirmed. Under Oregon law, ORS 736.325 (2), plaintiff is entitled to a reasonable attorney's fee in connection with this appeal.

Respectfully submitted,

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